



HARRIS, WILTSHIRE
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July 17, 2019

Ex Parte via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Promoting Telehealth in Rural America, WC Docket No. 17-310

Dear Ms. Dortch:

On July 15, 2019, I, counsel to GCI Communication Corp. (“GCI”), spoke with Randy Clarke, Acting Legal Advisor to Commissioner Starks. On July 16, 2019, I left a voicemail message with Preston Wise, Special Counsel to the Chairman. Both calls addressed the Draft Order regarding the Rural Healthcare support mechanism currently slated for consideration at the Commission’s August 1, 2019 Open Meeting.¹

While there are many good and important changes proposed by the Draft Order, particularly with respect to the competitive bidding rules and bid evaluation processes, the core provisions regarding the determination of comparable rural and urban rates are difficult to evaluate, particularly in the very compressed period—from the release of the Draft Order on July 11, 2019, through the start of the Sunshine period on July 25, 2019—for further public input. A critical component of the new mechanism is the determination of which areas are “comparable” rural areas, as well as which services will be considered similar. An erroneous determination as to either will fail to implement Section 254(h)(1)(A)’s statutory command that rural healthcare providers pay only what an urban healthcare provider would pay for “similar” service, and that the telecommunications carrier supplying the service receive support for the amount that a non-healthcare provider would pay for “similar” services in “comparable” rural areas of the state.² From a practical standpoint, an erroneous determination of the rural rate for a similar service in a comparable rural area will likely mean that services necessary to support telemedicine do not get built or upgraded in high cost rural areas, particularly when there are no other entities in that rural community buying services similar to the rural healthcare provider.

For Alaska, we can tell from the map at Figure 3 of the Draft Order that the Draft Order treats highly dissimilar areas as “comparable,” including them all within the “Extremely Rural”

¹ *Promoting Telehealth in Rural America*, Draft Report & Order, WC Docket No. 17-310 (Draft rel. July 11, 2019) (“Draft Order”), <https://docs.fcc.gov/public/attachments/DOC-358434A1.pdf>. Although GCI supported the use of the Extremely Rural categorization for prioritization, that is a different purpose than use in capping rural rates.

² 47 U.S.C. 254(h)(1)(A).

tier.³ The areas in Alaska covered by the Extremely Rural tier include, on the one hand Valdez (the southern terminus of the Alaska Pipeline) and other communities interconnected with fiber on highway, rail or pipeline routes and with electrical power supplied by an intertied power grid, and, on the other hand, highly remote communities that can be reached only by airplane or boat, that must generate and distribute all power locally, and are served only through satellites, or in some cases, microwave. As Alaska providers have pointed out, these different areas are not at all comparable in terms of the costs to serve.⁴ Grouping them together will systematically undersupport service to the higher cost areas because the rates included in determining a median will mix rates for lower cost and higher cost areas. Areas that can be served only by satellite should not be grouped with areas that can be served by satellite and other means; similarly, areas that can only be served by satellite and microwave are likely not similar from a cost perspective to areas that can also be served by fiber. At least as to Alaska, these are an “important aspect of the problem” that must be considered in order reasonably to implement Section 254(h)(1)(A).⁵

While we can make at least some of these observations for Alaska, it will be much harder for carriers serving the Lower 48 and their rural healthcare provider customers easily to undertake a similar analysis. Figure 3 is small, and does not contain even state line boundaries. It would be extremely difficult for a Lower 48 carrier to ascertain which communities fell into which rural tiers (Extremely Rural, Rural, Less Rural, or Urban). Yet, just as with Alaska, it is important for all stakeholders to be able to evaluate whether the Commission is similarly grouping together only areas with similar cost characteristics, or if the tiers include areas with significantly divergent costs. To be able to make such an evaluation, stakeholders would need access to a Figure 3 that was more akin to the Commission’s study area boundary maps, which are interactive and allowed an interested party to zoom in to see where boundaries fell in each community.⁶ Of course, even once such a map was available, stakeholders would need some time to analyze the maps and how the Commission proposed to group communities.

³ Draft Order at 17 Fig. 3.

⁴ See Supplemental Comments of Alaska Communications at 9–11, WC Docket No. 17-310 (filed Jan. 30, 2019); Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, WC Docket No. 17-310, at Attachment (filed Dec. 17, 2018). See also Comments of General Communication, Inc. at 5–7, WC Docket No. 17-310 (filed February 2, 2018) (describing the different demographic and infrastructure conditions in Alaska).

⁵ See *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (“[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

⁶ See Federal Communications Commission, Study Area Boundaries, (February 25, 2019), <https://www.fcc.gov/reports-research/maps/study-area-boundaries/>.

The tasks that the Draft Order would assign to USAC in terms of determining which rates in its to-be-constructed database are similar to a given healthcare provider's service present other difficult complexities.⁷ The Draft Order recognizes that bandwidth level is a significant determinant, as well as whether a service is best efforts or dedicated, symmetrical, or asymmetrical.⁸ The Draft Order also recognizes that there could be other service quality specifications that could be significant and affect comparable rates, but then in a footnote suggests that USAC would publish two types of rates—dedicated and not-specified-as-dedicated.⁹ In reality, USAC will have to consider the full range of offered priority levels, as well as distinguish circuits that have latency limits, given that some of these circuits support medical procedures or electronic health records systems that are not latency-tolerant. There is a significant question as to whether USAC has the institutional competence to evaluate such distinctions and make comparability determinations, and whether the databases to which it has access will support such critical delineations. Erroneously grouping lower quality services with higher quality services could have significant consequences: it will tend to undersupport the higher quality services that are necessary for many telemedicine applications.

Furthermore, any database will likely include rates subject to volume and term discounts, with those that are not. Yet it is not clear how USAC will account for those variations. Using high volume, longer term contracts to set rates for shorter term or lower volume contracts disrupts the economics of such offers and could limit their availability—and thus lead to higher rates and support costs.

USAC's existing E-rate Open Data database, from which the Draft Order tells USAC to pull data, also has significant data quality issues, which the Draft Order does not address. Unless those issues are addressed, USAC would likely be using erroneous data to determine urban and rural rates. As an indicative example, GCI last year reviewed a comparable pricing analysis that the Wireline Competition Bureau staff prepared of GCI's Telecom Program funding requests, based on the E-rate Open Data database. The attached document shows some of the errors that were found, which led to erroneous conclusions.¹⁰ In some instances, best efforts services were compared with dedicated services, services were listed with the wrong bandwidth or as the sum of the bandwidth across multiple circuits, asymmetrical bandwidth was listed as symmetrical, and/or the database indicated the wrong type of service (e.g., satellite, fiber, cable, microwave). Data quality assurance is critical, particularly because the E-rate Open Data was not collected for ratesetting purposes, and was collected from beneficiaries that may not be as familiar with the technical descriptions of their services. Bad data will lead to inappropriate rates.

⁷ In addition to these operational issues, there are also legal issues as to whether the scope of the delegation to USAC is legally permissible.

⁸ See Draft Order ¶ 17

⁹ Compare Draft Order ¶ 17 with Draft Order ¶ 17 n. 51.

¹⁰ The attached document is not exhaustive of the errors, nor does it list all circuits affected by the example errors.

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This letter does not exhaustively catalog the potential issues raised by the Draft Order's urban and rural rate provisions. We are highlighting those that were most apparent upon initial review of the Draft Order.

We urged the Commission to consider whether additional information and time for public review and analysis would be helpful to its evaluation and possible refinement of the Draft Order.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

John T. Nakahata

Counsel to GCI Communication Corp.

cc: Randy Clarke
Preston Wise
Arielle Roth
Jamie Susskind
Travis Litman
Trent Harkrader

Attach.